SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 92-301 Decided April 22, 1992

Appeal from a Finding of No Significant Impact and Decision Record of the Beaver River Resource Area Manager, Bureau of Land Management, approving notices of intent to conduct geophysical exploration for oil and gas. EA UT-0422-92-006.

Motion to Intervene Granted; Decision Affirmed.

1. Geophysical Exploration: Notice of Intent--Rules of Practice: Appeals: Effect of--Rules of Practice: Appeals: Notice of Appeal--Rules of Practice: Appeals: Stay

   The general regulations governing proceedings before the Office of Hearings and Appeals contain a rule, 43 CFR 4.21(a), providing that a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and that the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. The rule specifically provides, however, that it is effective "[e]xcept as otherwise provided by law or other pertinent regulation." An interim final rule, published in the Federal Register on Mar. 13, 1992 (57 FR 9010), 43 CFR 3150.2, provides otherwise by making decisions approving notices of intent to conduct geophysical exploration effective pending appeal.

2. Geophysical Exploration: Generally--Rules of Practice: Appeals: Effect of--Rules of Practice: Appeals: Notice of Appeal--Rules of Practice: Appeals: Stay

   The interim final rule amending 43 CFR Subpart 3150 to make decisions and approvals of the authorized officer in onshore oil and gas geophysical exploration matters effective pending appeal has the effect of making such BLM determinations final agency action immediately subject to judicial review under the provisions of 5 U.S.C. § 704 (1988). While the interim final rule provides that a petition for stay may be filed with the Board of Land Appeals, a person would not be required to exhaust that procedure before proceeding to District Court.

APPEARANCES: Stephen Koteff, Esq., Southern Utah Wilderness Alliance, Salt Lake City, Utah; David K. Grayson, Assistant Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; Charles L. Kaiser, Esq., and Scott W. Hardt, Esq, Denver, Colorado, and David L. Matloch, Esq., Dallas, Texas, for Hunt Oil Company, intervenor.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Southern Utah Wilderness Alliance (SUWA) has appealed from a Finding of No Significant Impact (FONSI) and Decision Record of the Beaver River Resource Area Manager, Bureau of Land Management (BLM), dated March 25, 1992, approving geophysical exploration by Northern Geophysical of America (Northern Geophysical) in the area of the Wah Wah Mountains in southwestern Utah. Northern Geophysical sought to conduct the exploration on behalf of Hunt Oil Company (Hunt), the record titleholder of certain Federal and State oil and gas leases within the Beaver River Resource Area.

On January 3, 1992, Northern Geophysical filed two notices of intent, pursuant to 43 CFR 3151.1, to run a total of five seismic lines on Hunt's leases in order to obtain geophysical data. BLM completed an environmental assessment (EA) of the proposal (EA UT-044-92-006), and on January 30, 1992, issued a FONSI and a Decision Record approving the proposal. Thereafter, on February 27, 1992, Hunt requested that BLM withdraw its decision approving the proposal "to allow us to do further inventory of raptors and perhaps do additional class III clearance work for archeology." Hunt also advised BLM that it would "be in contact with your office shortly to confirm the details and scheduling of the proposed work." On the same day, BLM vacated its decision.

On March 12, 1992, BLM learned from counsel for Hunt that a raptor survey had been conducted and that a report would be sent to BLM within a few days. In a March 19, 1992, letter to Hunt, BLM expressed its concern regarding the survey, stating:

> We were completely unaware of the details and the scheduling of the work.
>
> Our office requires that contractors work with our office directly to avoid any conflict of interest between the contractor and the company requesting the work. This was not done in this circumstance and is of great concern.
>
> There is not much that can be done at this point except to inform you that any future contract work must be approved through us and that our staff is to be in direct contact with the contractor.

On March 20, 1992, counsel for Hunt forwarded to BLM a copy of a report of the results of the raptor survey which had been conducted on March 10, 1992, by individuals associated with Department of Zoology, Brigham Young

University. 1/ The report recommended in essence that the seismic activity commence immediately. Counsel for Hunt also submitted to BLM proposed changes in the language of the wildlife portions of the EA.

On March 24, 1992, BLM completed an amended wildlife clearance report which analyzed the information provided in the raptor survey report. BLM indicated in the report that it consulted with one of the individuals who had conducted the raptor survey in preparing its report. On March 25, 1992, the Beaver River Resource Area Manager issued his FONSI and Decision Record approving the seismic activity. The revised EA of the same date included an amended section addressing the environmental impacts of the proposed activity on wildlife. BLM did not adopt the language offered by counsel for Hunt. As part of the terms and conditions for approval of the seismic activity, BLM included the mitigating measures developed in the amended wildlife clearance report.

SUWA filed its notice of appeal with BLM on March 27, 1992, and requested that the Area Manager stay his decision. By letter dated March 30, 1992, the Area Manager informed SUWA that "we plan to implement the decision as it stands, and to allow Northern Geophysical the right to immediately begin their action under the stipulations provided in the permit." On March 30, 1992, SUWA filed with the Board a document styled "First Statement of Reasons and Request for Immediate Stay." Therein, SUWA argues that BLM violated 43 CFR 4.21(a) by failing to wait for the 30-day appeal period before implementing its decision. SUWA acknowledges the existence of the interim final rule, 43 CFR 3150.2, promulgated by the Department on March 13, 1992 (57 FR 9010). However, it argues the interim final rule does not apply.

The interim final rule provides:

> (b) All decisions and approvals of the authorized officer under this part shall remain effective pending appeal unless the Interior Board of Land Appeals determines otherwise upon consideration of the standards stated in this paragraph. The provisions of 43 CFR 4.21(a) shall not apply to any decision or approval of the authorized officer under this subpart. A petition for stay of a decision or approval of the authorized officer shall be filed with the Interior Board of Land Appeals, Office of Hearings and Appeals, Department of the Interior, and shall show sufficient justification based on the following standards: (1) The relative harm to the parties if a stay is granted or denied, (2) the likelihood of appellant's success on the merits, (3) the likelihood of irreparable harm to the appellant or resources if the stay is not granted, and (4) whether the public interest favors granting the stay.

1/ The seven page report, dated Mar. 19, 1992, is entitled, "A SURVEY FOR RAPTOR NEST SITES IN THE WAH WAH AND PINE VALLEYS AND THE WAH WAH MOUNTAINS ALONG PROPOSED SEISMIC LINE TRANSECTS."

SUWA's argument is based on the Department's use of "subpart" in the second sentence of the regulation. It charges that by using the word "subpart," the Department restricted the scope of 43 CFR 3150.2 to Subpart 3150, and that approval of the notices of intent in this case occurred pursuant to 43 CFR 3151.1, a regulation in Subpart 3151. SUWA urges the Board immediately to order BLM to honor the requirements of 43 CFR 4.21(a) and to stay implementation of the decision pending a decision on the merits of the appeal.

Counsel for SUWA contacted the Board on March 31, 1992, to determine what action would be taken on his request. He was informed that the Board would take no action until receipt of the case record from BLM.

On March 31, 1992, SUWA filed an action in the United States District Court for the District of Utah styled Southern Utah Wilderness Alliance v. Tait, No. 92-C-289 S, seeking a temporary restraining order (TRO) enjoining the effect of BLM's March 25, 1992, decision. The following day, a hearing was held in Salt Lake City before Judge David Sam. Hunt sought intervention and participated in that hearing. At the conclusion of the hearing, Judge Sam orally denied the request for a TRO, ruling that "the express purpose for which Section 3150.2 was enacted was to eliminate the automatic stay provision as to oil and gas, geophysical exploration, and place in its stead the appeal procedure outlined in said section" (Excerpt of Transcript of April 1, 1992, proceeding (Excerpt) at 3, filed by counsel for BLM on April 8, 1992). He also ruled that "the alleged irreparable injury loss or damage is speculative at best." Id.

On April 3, 1992, the Board received the case file from BLM. On the same day, Hunt filed a motion to intervene in this case, asserting that it is an interested party and it may be adversely affected by the Board's decision in this appeal. Those assertions are clearly correct. The motion to intervene is granted.

Hunt also filed a response to SUWA's request for immediate stay, arguing that SUWA failed to satisfy the legal standards for obtaining a stay, as established by the interim final rule.

On April 6, 1992, counsel for BLM filed a response to SUWA's request for stay. Counsel argues that the Board should deny the request based on the court's April 1, 1992, ruling.

On April 20, 1992, SUWA filed a document styled "Request of Expedited Review and Second Statement of Reasons." Therein, SUWA withdrew its request for immediate stay. In its filing, SUWA expands on its argument that 43 CFR 4.21(a) continues to require that BLM wait 30 days to implement its geophysical exploration decisions.

[1] SUWA's argument that 43 CFR 4.21(a) is applicable in this case was correctly rejected by the court. That regulation is a general regulation contained in 43 CFR Subpart B, the regulations governing procedure and practice in proceedings before the Office of Hearings and Appeals. That

general regulation provides that a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and that the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. The regulation specifically provides, however, that it is effective, "[e]xcept as otherwise provided by law or other pertinent regulation." The effect of the Department's March 13, 1992, interim final rule was to provide otherwise by "other pertinent regulation." The intent of the Department was expressly stated in the regulatory preamble:

> This interim final rule adds to 43 CFR part 3150 a section governing appeals of decisions and approvals relating to onshore oil and gas geophysical exploration operations to allow the decisions and approvals of an authorized officer to remain in full force and effect when an appeal is filed, unless the appellant shows sufficient justification to the Interior Board of Land Appeals. [2/]

57 FR 9010 (Mar. 13, 1992).

The first sentence of 43 CFR 3150.2(b) refers to decisions and approvals of the authorized officer under "this part." Such language indicates that rule is effective as to all subparts of 43 CFR Part 3150, which would include Subpart 3151. The second sentence of the regulation is merely redundant of the first sentence since the effect of the first sentence is
to void the application of the stay provisions of 43 CFR 4.21(a), in and of itself. The second sentence adds nothing to the scope of the rule. SUWA's argument relating to the use of "subpart" in the second sentence of the regulation merely points out inartful drafting of the rule. It does not persuade us that 43 CFR 4.21(a) remains applicable in any way to oil and
gas geophysical exploration decisions of BLM.

[2] The impact of the interim final rule on the decision in this
case was to make the Beaver River Resource Area Manager's decision effective during the time in which a person adversely affected by that decision could file an appeal and during the pendency of such an appeal. The result of that regulatory change is to make BLM decisions and approvals relating to oil and gas geophysical exploration immediately subject to judicial review without the necessity to exhaust administrative remedies. See 5 U.S.C. § 704 (1988). 3/ While the interim final rule provides that

2/ The interim final regulation also amended the oil and gas operation regulations at 43 CFR Part 3160 to clarify that decisions and approval of the authorized officer were effective immediately.
3/ Where an administrative decision or order is given immediate effect, any party adversely affected thereby has immediate, direct access to the courts, and the Government's affirmative defense of failure to exhaust administrative remedies is waived. The Department may only require that such party appeal to superior agency authority, where that agency, by rule, "provides that the action meanwhile is inoperative." United States v. Consolidated Mining & Smelting Co., 455 F.2d 432, 439-40 (9th Cir. 1970).

a petition for stay may be filed with the Board, a person would not be required to exhaust that procedure before proceeding to District Court.
In this case, SUWA did file such a petition with this Board. However,
upon being informed by this Board that no action could be taken on the petition until receipt by the Board of the case record from BLM, SUWA
filed the action in District Court.

In BLM's reply to SUWA's request for stay, it states:

> In Judge Sam's oral decision from the bench, he indicated serious concern that the Final Interim Regulation amending 43 C.F.R. § 3150 to remove the automatic stay of 43 C.F.R. § 4.21(a) coupled with IBLA's unwillingness to deal with emergency stay requests effectively created a situation in which appellants really have no effective administrative appeal in
> these matters.

(BLM Reply at 2).

What Judge Sam actually said was: "[T]he Court recognizes and is concerned with Plaintiff's observation that the harm, if any, may be to the appeals process and the right of third parties to have meaningful participation in the decision making process" (Excerpt at 3). The Judge did not refer to the Board.

Contrary to BLM's incorrect representation of Judge Sam's statement, there is no "unwillingness" on the part of the Board to act on emergency stay requests. However, it is difficult, if not impossible, for the Board to determine, under the guidelines set forth in the regulation, whether a request for a stay should be granted without reviewing the case record. It was lack of a case record, and not any "unwillingness" on the part of the Board, which constrained the Board's actions. When BLM issues a decision which is placed in full force and effect and a party appealing therefrom seeks an order from the Board to stay such action, it is the responsibility of BLM to provide the Board with the administrative record in as expeditious a manner as is possible. Thus, it is the failure by BLM promptly to forward the record which may well deprive an appellant of an effective administrative appeal.

In its pleadings filed with this Board, SUWA provides no indication of its substantive concerns regarding the merits of this case, except that it alleges that the exploration activity is to take place "on lands proposed for wilderness by H.R. 1500, introduced in the House of Representatives by Congressman Wayne Owens, and by the Utah Wilderness Association." Final administrative decisions designating wilderness study areas (WSAs) in Utah and excluding remaining lands from such areas were issued in the 1980's. The lands in question were not included in a WSA. Therefore, BLM may administer those lands for other purposes, including the approval of geophysical exploration for oil and gas. See Southern Utah Wilderness Alliance, 122 IBLA 17, 21 (1992).

SUWA has failed to point out any error in the Area Manager's decision. That decision must be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Hunt's motion to intervene is granted, and the Area Manager's decision is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge